**UNITED STATES BANKRUPTCY COURT**

Eastern District of California

Honorable Michael S. McManus
Bankruptcy Judge
Modesto, California

**July 24, 2000 at 10:00 a.m.**

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1. 00-91708-A-7 LEAANN CARBAJAL

HEARING ON ORDER TO SHOW CAUSE RE DISMISSAL, CONVERSION OR IMPOSITION OF SANCTIONS FOR FAILURE OF THE DEBTOR TO PAY FILING FEES
6/21/00 [10]

**Final Ruling:** This case shall remain pending. On May 3, 2000, the debtor filed a case under chapter 7. The debtor agreed to pay the filing fee in installments according to the schedule set out below. As is reflected in the schedule of payments, since the issuance of the order to show cause, the debtor has paid all of her filing fees. This case shall remain pending.

| Schedule of Payments | | Payments Made | |
|---|---|---|---|
| Date | Amount | Date | Amount |
| June 2, 2000 | $50.00 | | |
| July 3, 2000 | $50.00 | July 10, 2000 | $200.00 |
| August 1, 2000 | $50.00 | | |
| August 31, 2000 | $50.00 | | |

2. 00-91912-A-7 JEAN IRIBARREN

HEARING ON ORDER TO SHOW CAUSE RE DISMISSAL, CONVERSION OR IMPOSITION OF SANCTIONS FOR FAILURE OF THE DEBTOR AND/OR DEBTOR'S ATTORNEY TO ATTEND THE SECTION 341 MEETING SET FOR JUNE 22, 2000
6/28/00 [6]

**Tentative Ruling:** On May 17, 2000, the debtor filed a case under chapter 7. The first meeting of creditors was scheduled for June 22, 2000. The debtor did not appear. The meeting was continued to July 13, 2000. The trustee has not yet filed a report from that date. This case shall remain pending on the condition that the debtor attended the rescheduled meeting of creditors on July 13, 2000. If the debtor failed to attend the rescheduled meeting of creditors, the case shall be dismissed without further notice or hearing.

3. 00-91929-A-7 JAMES & MARSHA QUINTANA — HEARING ON ORDER TO SHOW CAUSE RE DISMISSAL, CONVERSION OR IMPOSITION OF SANCTIONS FOR FAILURE OF THE DEBTORS AND/OR DEBTORS' ATTORNEY TO ATTEND THE SECTION 341 MEETING SET FOR JUNE 22, 2000
6/28/00 [7]

**Tentative Ruling:** On May 18, 2000, the debtors filed a case under chapter 7. The first meeting of creditors was scheduled for June 22, 2000. The debtors did not appear. The meeting was continued to July 13, 2000. The trustee has not yet filed a report from that date. This case shall remain pending on the condition that the debtors attended the rescheduled meeting of creditors on July 13, 2000. If the debtors failed to attend the rescheduled meeting of creditors, the case shall be dismissed without further notice or hearing.

4. 00-92035-A-7 JANIS DARLENE ROSS — HEARING ON ORDER TO SHOW CAUSE RE DISMISSAL, CONVERSION OR IMPOSITION OF SANCTIONS FOR FAILURE OF THE DEBTOR AND/OR DEBTOR'S ATTORNEY TO ATTEND THE SECTION 341 MEETING SET FOR JUNE 20, 2000
6/26/00 [9]

**Tentative Ruling:** On May 25, 2000, the debtor filed a case under chapter 7. The first meeting of creditors was scheduled for June 20, 2000. The debtor did not appear. The meeting was continued to July 20, 2000. This case shall remain pending on the condition that the debtor attended the rescheduled meeting of creditors on July 20, 2000. If the debtor failed to attend the rescheduled meeting of creditors, the case shall be dismissed without further notice or hearing.

5. 00-91867-A-7 JERRY & CONNIE MONTGOMERY — HEARING ON ORDER TO SHOW CAUSE RE DISMISSAL, CONVERSION OR IMPOSITION OF SANCTIONS FOR FAILURE OF THE DEBTORS' TO PAY THE FILING FEES
6/22/00 [8]

**Tentative Ruling:** This case shall be dismissed unless the debtors are current on their filing fee installment payments within three court days of the date of entry of an order on this matter.

On May 15, 2000, the debtors filed a case under chapter 7. The debtors paid $40.00 toward their filing fees and agreed to pay the balance of their filing fees in installments according to the schedule set out below. As is reflected in the schedule of payments, the debtors have not paid any of the installments.

| Schedule of Payments | | Payments Made | |
|---|---|---|---|
| Date | Amount | Date | Amount |

| | | | |
|---|---|---|---|
| June 14, 2000 | $40.00 | | None |
| July 14, 2000 | $40.00 | | None |
| August 14, 2000 | $40.00 | | |
| September 12, 2000 | $40.00 | | |

Unless the debtors are current on their installment payments within three court days of the date of entry of an order on this matter, this bankruptcy case shall be dismissed without further notice or hearing.

6. 00-91967-A-7 CLINTON & KIMBERLY RIDDLE — HEARING ON ORDER TO SHOW CAUSE RE DISMISSAL, CONVERSION OR IMPOSITION OF SANCTIONS FOR FAILURE OF KIMBERLY RIDDLE TO ATTEND THE SECTION 341 MEETING ON JUNE 20, 2000
6/28/00 [9]

**Tentative Ruling:** On May 22, 2000, the debtor filed a case under chapter 7. The first meeting of creditors was scheduled for June 20, 2000. Mr. Riddle attended the meeting, but Mrs. Riddle did not attend because she was incarcerated. The meeting was continued to July 20, 2000. Mrs. Riddle has filed a declaration in which she has made arrangements with the authorities to attend the meeting to be held on July 20, 2000. This case shall remain pending on the condition that the Mrs. Riddle attended the rescheduled meeting of creditors on July 20, 2000. If she failed to attend the rescheduled meeting of creditors, the case shall be dismissed without further notice or hearing.

7. 00-91268-A-7 HELEN MIHALOPOULOS — HEARING ON ORDER TO SHOW CAUSE RE DISMISSAL, CONVERSION OR IMPOSITION OF SANCTIONS FOR FAILURE OF THE DEBTOR TO PAY THE FILING FEES
6/22/00 [11]

**Tentative Ruling:** This case shall be dismissed unless the debtor is current on her filing fee installment payments within three court days of the date of entry of an order on this matter.

On April 3, 2000, the debtor filed a case under chapter 7. The debtor agreed to pay her filing fees in installments according to the schedule set out below. As is reflected in the schedule of payments, the debtor has not paid any of her installment filing fees.

| Schedule of Payments | | Payments Made | |
|---|---|---|---|
| Date | Amount | Date | Amount |
| May 3, 2000 | $50.00 | | None |
| June 2, 2000 | $50.00 | | None |

| | | | |
|---|---|---|---|
| July 3, 2000 | $50.00 | | none |
| August 1, 2000 | $50.00 | | |

Unless the debtor is current on her installment payments within three court days of the date of entry of an order on this matter, this bankruptcy case shall be dismissed without further notice or hearing.

8. 99-90406-A-11 SUNRIVER PACKING COMPANY, INC.
ASG #10

CONT. HEARING ON MOTION FOR APPROVAL OF MICHAEL DUNCAN SETTLEMENT AGREEMENT 6/5/00 [362]

**Final Ruling:** The parties have continued the hearing on this matter to September 5, 2000, at 10:00 a.m.

9. 99-91407-A-7 WILLIAM J. COAKLEY
CWC #3

HEARING ON MOTION TO APPROVE SETTLEMENT OF CONTROVERSY 6/22/00 [48]

**Tentative Ruling:** The compromise will be approved. On March 29, 1999, the debtor filed a chapter 7 petition. The trustee asserts that among the assets of the estate are proceeds in the amount of $22,642.93 which were derived from the sale of the debtor's interest in real property located at 2060 Peace Way, Turlock, California.

The debtor claims that he has exempted $5,329.00 of equity in the property, that he is entitled to a creditor of $6,214.00 for the cost of adding a spa and deck to the property post-petition, and that he is entitled to a credit of $13,492.22 for making post-petition payments to secured creditor Capital Pacific Mortgage. The debtor’s fourth iteration (and last) of Schedule C claims the property exempt in the amount of $5,329.00. Under the compromise, the trustee will pay the debtor $9,500.00 and balance will remain in the estate.

Approval of a compromise must be based upon considerations of fairness and equity. The court may approve a compromise or settlement. Fed. R. Bankr. P. 9019. The court must consider and balance four factors: (1) the probability of success in the litigation; (2) the difficulties, if any, to be encountered in the matter of collection; (3) the complexity of the litigation involved; and (4) the paramount interest of the creditors with a proper deference to their reasonable views. In re Woodson, 839 F.2d 610 (9th Cir. 1988).

Given that the claim of exemption appears to be impervious to objection, the actual amount in dispute is about $17,500.00. Under the compromise, the trustee will retain about $13,100.00. Thus, the trustee is in effect trading $4,100.00 in potential assets of the estate to avoid the cost of litigation which could easily consume such an amount and perhaps more. Additionally, by compromising the dispute the trustee is avoiding the uncertainties inherent in litigation. Collection is not an issue. The compromise appears to be in the best interest of creditors, none of whom have opposed the motion.

10. 00-91614-A-7 FRANCIS & REGGIE PERALTA

HEARING ON THE UNITED

**Tentative Ruling:** The motion is denied. A case under chapter 7 may be dismissed if the debtors' debts are primarily consumer debts and it would be a substantial abuse of the provisions of chapter 7 to grant a discharge. 11 U.S.C. § 707(b).

The debtors argue that the trustee has not demonstrated that they acted in bad faith. Bad faith is not necessarily an element under section 707(b). "[A] finding that a debtor is able to pay his debts, standing alone, supports a conclusion of substantial abuse." In re Kelly, 841 F.2d 908, 915 (9th Cir. 1988).

The debtors' debts are primarily consumer debts. In the Ninth Circuit, primarily means more than one-half. In re Kelly, 841 F.2d 908 (9th Cir. 1988). In this case, the debtors have $203,100 in secured debt, all of which is consumer debt. The debtors have scheduled $75,150 in unsecured non-priority debt. The debtors have scheduled no unsecured priority debt.

Granting relief in this case would not constitute substantial abuse of chapter 7. The Ninth Circuit has held "that the debtor's ability to pay his debts when due as determined by his ability to fund a Chapter 13 plan, is the primary factor to be considered in determining whether granting relief would be a substantial abuse" as that term is used in 11 U.S.C. § 707(b). In re Kelly, 841 F.2d 908, 914 (9th Cir. 1988).

The debtors in this case have a net scheduled monthly income of $4,820.00. This must be increased by the $93.00 per month that Mrs. Peralta contributes to a 401K retirement plan. In a chapter 13 case, the debtors would not be permitted to make voluntary pension or retirement plan contributions.

> Voluntary contributions to retirement plans, however, are not reasonably necessary for a debtor's maintenance or support and must be made from disposable income. See In re Cornelius, 195 B.R. 831, 835 (Bankr. N.D. N.Y. 1995); In re Cavanaugh, 175 B.R. 369, 373 & n. 3 (Bankr. D. Idaho 1994); In re Fountain, 142 B.R. 135, 137 (Bankr. E.D. Va. 1992); In re Festner, 54 B.R. 532, 533 (Bankr.E.D.N.C.1985). As one bankruptcy court explained in refusing to confirm a plan that proposed to make mortgage payments on non-residential property rather than satisfy unsecured creditors, "[a]lthough investments may be financially prudent, they certainly are not necessary expenses for the support of the debtors or their dependents. Investments of this nature are therefore made with disposable income; disposable income is not what is left after they are made." In re Lindsey, 122 B.R. 157, 158 (Bankr. M.D. Fla. 1991).

In re Anes, 195 F.3d 177, 181-82 (3rd Cir. 1999).

The debtors' adjusted net monthly income is $4,913.00

The debtors have scheduled total monthly expenses of $5,123.00. This amount must be adjusted downward, as certain expenditures would not be allowed in a

chapter 13 case as reasonable and necessary. First, the $160.00 per month for a jet ski is not a reasonable expense. Second, the debtors spend $315 per month on primary and secondary private school tuition and an additional $600 per month for school expenses for their three children.

In In re Jones, 55 B.R. 462 (Bankr. D. Minn. 1985), the court concluded that "[a]n expensive private school education is not a basic need of the Debtor's dependents, particularly in view of the high quality public education available in this country. . . ." In re Jones, 55 B.R. at 467. In other words, a debtor cannot divert funds from creditors to her or his children's education. "A debtor does not have the right to force his creditors to donate to his children's education." In re Goodson, 130 B.R. 897 (Bankr. N.D. Okla. 1991) as quoted in In re Attanasio 218 B.R. 180, 231 (Bankr. N.D. Ala. 1998).

The $315.00 per month would not be considered reasonable and necessary expenses in a chapter 13 case. The court will allow $150.00 for school expenses for the debtors three children. This is reasonable, especially in light of the fact that the debtors did not schedule any amounts for recreational activities or charitable contributions.

Therefore, the debtor net monthly expenses are:

$5,208.85 - $160.00 - $315.00 - $450.00 = $4383.85.

The debtors' monthly disposable income is:

$4,913.00 - $4,383.85 = $529.15

Therefore, the debtors can pay $19,049.40 over a 36-month plan. Allowing $2000 for attorneys' fees and 8% for trustee's fees, the debtors can pay creditors approximately $15,525.45 in a chapter 13 case.

The Ninth Circuit Bankruptcy Appellate Panel determined in one case that when the debtor had the ability to pay 43% of his debts in a chapter 13 case, to allow a chapter 7 discharge would constitute a substantial abuse of the chapter 7. In re Gomes, 220 B.R. 84 (B.A.P. 9th Cir. 1998). In this case the debtors can pay 20.6% of their unsecured debt after paying their attorneys' fees, and the trustee's fees. However, the percentage of payment is only one dimension of the debtors' ability to pay. The absolute amount that they can pay each month is also important. For instance, if one debtor could pay $2,300 per month into a 36-month plan, representing 33% of his or her unsecured debt, and another debtor could pay $2,300 per month into a 36-month plan, representing 100% of his or her unsecured debt, it would be folly to state that the second debtor is abusing chapter 7 but the first is not. In Gomes, the Bankruptcy Appellate Panel stated:

> The bankruptcy court found that the Gomes' disposable income in the amount of $1,287.90 was "no small sum" for purposes of funding a chapter 13 plan, and we agree.

Gomes, 220 B.R. at 88.

The debtors can pay about $529.15 per month. The absolute amount is significantly below the $1,287 in Gomes, and the debtors in this case have not

scheduled any amount for recreation or charitable contributions. Normally the court would expect some amount for recreation or other discretionary spending in calculating chapter 13 disposable income.

The court cannot say that this case is a substantial abuse of chapter 7 to permit the debtors to continue to prosecute this case. The motion is denied.

11. 00-91224-A-7 DIEGO & PATRICIA MENDIZABAL
UST #1

HEARING ON THE UNITED STATES TRUSTEE'S MOTION FOR DISMISSAL PURSUANT TO 11 U.S.C. SECTION 707(B) 6/26/00 [8]

**Tentative Ruling:** The motion is denied. A case under chapter 7 may be dismissed if the debtors' debts are primarily consumer debts and it would be a substantial abuse of the provisions of chapter 7 to grant a discharge. 11 U.S.C. § 707(b).

The debtors' debts are primarily consumer debts. In the Ninth Circuit, primarily means more than one-half. In re Kelly, 841 F.2d 908 (9th Cir. 1988). In this case, the debtors have $279,381.00 in secured debt, all of which is consumer debt. The debtors have scheduled $63,914.00 in unsecured non-priority debt, all of which is consumer debt. The debtors have scheduled no unsecured priority debt.

Granting relief in this case would not constitute substantial abuse of chapter 7. The Ninth Circuit has held "that the debtor's ability to pay his debts when due as determined by his ability to fund a Chapter 13 plan, is the primary factor to be considered in determining whether granting relief would be a substantial abuse" as that term is used in 11 U.S.C. § 707(b). In re Kelly, 841 F.2d 908, 914 (9th Cir. 1988).

The debtors, in their amended schedule I, indicate that they have net monthly income of $6,001.02. They schedule a $216.42 deduction for insurance. They do not, however, specify the type of insurance – is it term life insurance, whole life insurance health insurance, or some other kind of insurance? The type of insurance is important. Life insurance, particularly whole life insurance, may not be a reasonable and necessary expense in the context of chapter 13. See Smith v. Spurgeon (In re Smith), 207 B.R. 888, 890 (B.A.P. 9th Cir. 1996). Medical insurance, on the other hand, would most always be appropriate and in the context of this case (see below) would be reasonable and necessary. See In re Cavanaugh, 175 B.R. 369, 373 (Bankr. D. Idaho 1994). At any rate, the debtors have failed to explain the type of insurance or to establish that the deduction from income is mandatory or is a reasonably necessary expense. (This is distinguished from the life insurance that is reported as an expense and is discussed below.)

The United States Trustee also argues that the debtors' 401K deduction should not be allowed, but that fact is reflected in the debtors' amended schedule I. Therefore, the debtors' adjusted net monthly income is $6,217.44.

The debtors have scheduled total monthly expenses of $6,049.43. The United States Trustee argues that certain expenses must be adjusted downward as they would not be allowed in a chapter 13 case as reasonable and necessary. First,

the United States Trustee argues that the debtors would not be permitted to include the $500.00 per month for tuition for their children who are both in primary school. Generally, the court would agree with this proposition. In In re Jones, 55 B.R. 462 (Bankr. D. Minn. 1985), the court concluded that "[a]n expensive private school education is not a basic need of the Debtor's dependents, particularly in view of the high quality public education available in this country. . . ." In re Jones, 55 B.R. at 467. In other words, a debtor cannot divert funds from creditors to her or his children's education. "A debtor does not have the right to force his creditors to donate to his children's education." In re Goodson, 130 B.R. 897 (Bankr. N.D. Okla. 1991) as quoted in In re Attanasio 218 B.R. 180, 231 (Bankr. N.D. Ala. 1998).

But the debtors have satisfied the court that there is good cause to depart from this general proposition. The debtors state that their children need to attend the private school because they both suffer from severe chronic asthma and allergies. Mr. Mendizabal states that because of this condition, the children require daily mediation, 24-hour access to a breathing machine and someone able to recognize the symptoms who is willing to administer the required medication and monitor the use of the breathing machine. He further states that public school personnel have refused to accept the responsibility of making sure that the children take their required medication and further refuse to monitor the children's use of the breathing machine before, during and after school. The debtors further argue that if their children were unable to attend private school that Mrs. Mendizabal would have to quit her employment in order to provide care for the children.

Whether private school tuition, like any other expense, is a reasonably necessary expenses is determined on a case by case basis. In re Gillead, 171 B.R. 886, 890 (Bankr. E.D. Cal. 1994). In this case, the private tuition is in part of a necessary medical expense. Were the two expenses (tuition and medical care) were unbundled, medical care would cost more than the price of tuition, either in the form of an attendant or in the form of the opportunity cost of Mrs. Mendizabal's inability to work. No adjustment will be made for the tuition cost.

The boat ($170.00 per month) and piano ($80 per month) are not necessary expenses. The life insurance is a necessary expense. The purpose of the life insurance is pay medical expenses if Mr. Mendizabal's income is lost because of his death. Given the medical condition of the children and their age, this expense is reasonable and necessary. See Smith v. Spurgeon (In re Smith), 207 B.R. 888, 890 (B.A.P. 9th Cir. 1996).

The court will allow $100.00 for telephone and ISP expense for purposes of this analysis. The security cost is reasonable. The $65.00 for the gardener is not. Landscaping is not a necessity that should deprive creditors of payment.

Finally, the United States Trustee argues that the $200 of the $875 that the debtors spend on car payments ($475) and other transportation cost ($400) is not necessary. The debtors assert that they both commute to the Bay Area and that the vehicle is specially equipped with devices that clean the air thus reducing the likelihood of asthma attacks. The expense is reasonable.

In summary, the court makes the following adjustments to expenses:

| | | UST | Debtors | Court |
|---|---|---|---|---|
| Scheduled Expenses | | $6,399.43 | $6,399.43 | $6,399.43 |
| Adjustments | | | | |
| LESS | Tuition | $ 500.00 | $ 00.00 | $ 00.00 |
| | Boat | $ 170.00 | $ 170.00 | $ 170.00 |
| | Piano | $ 80.00 | $ 80.00 | $ 80.00 |
| | Life Insurance | $ 200.00 | $ 00.00 | $ 00.00 |
| | Telephone and ISP. | $ 220.00 | $ 100.00 | $ 120.00 |
| | Gardener, Mortgages, and repairs | | $ 00.00 | $ 65.00 |
| | Security | | $ 00.00 | $ 00.00 |
| | Transpor-tation | $ 200.00 | $ 00.00 | $ 00.00 |
| Adjusted net Monthly Exp. | | $ 5,029.43 | $6,049.43 | $5,964.43 |

The debtors' net monthly expenses, therefore, are $5,964.43. The debtors monthly disposable income is:

$6,217.44 - $5,964.43 = $253.01

The debtors can pay $9,108.36 over a 36-month plan. Allowing $2000 for chapter 13 attorneys' fees and 8% for trustee's fees, the debtors can pay creditors $6,379.69. The Ninth Circuit Bankruptcy Appellate Panel determined in one case that when the debtor had the ability to pay 43% of his debts in a chapter 13 case, to allow a chapter 7 discharge would constitute a substantial abuse of the chapter 7. In re Gomes, 220 B.R. 84 (B.A.P. 9th Cir. 1998). In this case the debtors can pay 9.9% of their unsecured debt after paying their attorneys' fees and the trustee's fees. But the percentage of payment is only one dimension of the debtors' ability to pay. The absolute amount that they can pay each month is also important. For instance, if one debtor could pay $2300 per month into a 36-month plan, representing 33% of his or her unsecured debt, and another debtor could pay $2300 per month into a 36-month plan, representing 100% of his or her unsecured debt, it would be folly to state that the second debtor is abusing chapter 7 but the first is not. In Gomes, the Bankruptcy Appellate Panel stated:

> The bankruptcy court found that the Gomes' disposable income in the amount of $1,287.90 was "no small sum" for purposes of funding a chapter 13 plan, and we agree.

Gomes, 220 B.R. at 88.

The debtors can pay about $253.01 per month. The absolute amount is significantly below the $1,287.00 in Gomes. The court cannot say that it is a substantial abuse of chapter 7 to permit the debtors to continue to prosecute this case. The motion is denied.

12. 00-90228-A-7 JAMES & MARIA HARLOW — HEARING ON MOTION TO ABANDON REAL PROPERTY (OST) 7/7/00 [31]
FW #1

**Tentative Ruling.** The motion is granted if no objections to the debtors' claim of exemption are raised at the hearing or are filed by the close of business today. On January 21, 2000, the debtors filed a chapter 13 petition. On May 26, 2000, the debtors converted their case to chapter 7. On June 22, 2000, the first meeting of creditors was concluded. On June 29, 2000, the chapter 7 trustee filed a report of no assets. On July 7, 2000, the debtors filed a motion (on order shortening time) to compel the chapter 7 trustee to abandon property of the estate commonly known as 725 W. Mariposa Street, Newman, California 95360.

On request of a party in interest and after notice and a hearing the court may order the trustee to abandon any property of the estate that is burdensome to the estate or that is of inconsequential value and benefit to the estate. 11 U.S.C. § 554(b). A party in interest may file and serve a motion requiring the trustee or debtor in possession to abandon property of the estate. Fed.R.Bankr.P. 6007.

The debtors scheduled the property at a fair market value of $85,000. The selling price is $87,500.00. The property is encumbered by a first deed of trust in favor of MetWest Mortgage Service in the approximate amount of $60,620.00. There is also a mechanic's lien on the property in the approximate amount of $10,000.00. The debtors have claimed the property exempt in the amount of $24,380.00. There is no equity in the property for the chapter 7 estate.

No party has objected to this claim of exemption. The deadline to object to claims of exemptions is 30 days after the date of the conclusion of the first meeting of creditors. Fed.R.Bankr.P. 4003(b). The first meeting of creditors concluded on June 22, 2000. Thirty days thereafter is July 22, 2000. Because July 22, 2000, is a Saturday, the deadline is extended to the next court date which in this case is July 24, 2000, the date of this hearing. See Fed.R.Bankr.P. 9006(a).

Accordingly, this motion will be granted, but only on the condition that no party files an objection to the claim of exemption of the debtors in the property that is the subject of this motion on or before the close of the clerk's office on this date, July 24, 2000.

13. 99-92931-A-7 ANTONIO & STELLA GEMIGNIANI — HEARING ON MOTION TO

ANTONIO & STELLA GEMIGNIANI VS.
PROVIDIAN NATIONAL BANK

AVOID LIEN
4/27/00 [15]

**Tentative Ruling:** No telephonic appearance is permitted to counsel for the party placing this matter on calendar because it did not include a motion control number as required by the local rules.

On June 29, 1999, the debtors filed a chapter 7 petition. The case was closed in the normal course of events, and on April 27, 2000, was reopened so that the debtors could bring this motion to avoid the judicial lien of Providian National Bank under 11 U.S.C. § 522(f). On June 20, 2000, the court issued an order setting this matter on calendar and setting a briefing schedule. The court ordered the movants to provide notice of this hearing to the respondent Providian National Bank on or before June 30, 2000, and to file proof of the same with the clerk before July 7, 2000. The movants did not file proof of service of the moving papers on Providian. Therefore, the matter will be continued in order that the motion can be re-served. A continued hearing date will be set at the hearing.

14. 97-90643-A-7 ALEXANDER POMPOSO
SSF #6

CONT. HEARING ON AMENDED ORDER TO SHOW CAUSE RE CONTEMPT FOR FAILURE TO DELIVER DOCUMENTS TO TRUSTEE
1/10/00 [83]

**Tentative Ruling:** None. Appearances are required.

15. 99-93943-A-7 ADR INTERNATIONAL, LTD. HEARING ON MOTION FOR ORDER REQUIRING TRUSTEE TO TURN OVER PROPERTY OF CREDITOR AVIS RENT-A-CAR
RAF #1 6/26/00 [48]

**Tentative Ruling:** The motion is denied. Creditor Avis Rent-a-Car, Inc., has filed a motion to compel the trustee to turn over certain business records.

As a preliminary matter, the court notes that both sides to this dispute assert claims against the other in amounts ranging from $450,000.00 to $900,000.00. Both sides also argue at length whether or not Avis has complied with the trustee's request for other information. None of these disputes are relevant to the issue presented in this motion.

In 1996, the debtor and Avis entered into an agreement under which Avis assigned accounts receivable to the debtor for collection. When the debtor filed its petition, it had in its possession certain business records which Avis now asserts are not property of the estate, but rather are its own property. Avis transferred its files ("the Avis Files") to the debtor in the normal course of their previous business dealings. Avis believes that the debtor would then input the relevant data from the hard copy of the Avis Files onto a computer program ("the Software"). Avis asserts that the Avis Files and the Software are its sole property and not property of the bankruptcy estate. The trustee has in his possession 25 boxes of documents, 15 of which contain "in house work product" and 10 of which contain "the original Avis collection files."

The trustee makes two assertions relating to his possession of the documents. First, the trustee asserts that the documents that the trustee currently possesses which are the subject of this dispute "would be material evidence in the ensuing litigation."

This fact is irrelevant to whether the Avis Files and the Software are property of the estate. The fact that documents may be evidence in prospective litigation does not make them property of the estate. If some of the boxes contain documents that the trustee does not believe are property of the estate, then there would seem to be no reason for him to keep them. If he may need them for future litigation, he can copy the documents or conduct discovery after suit is filed.

Second, "[t]he trustee asserts that the Debtor's files relating to the work performed under the Avis collection accounts are property of the bankruptcy estate."

This statement is somewhat ambiguous. It is unclear whether the trustee is asserting that the 15 boxes containing "in house work product" are property of the debtor, or if he is also asserting that the 10 boxes containing "the original Avis collection files" are property of the estate.

If he is only asserting that the first 15 boxes are property of the estate, then he is admitting that the other 10 boxes are not property of the estate, then there would seem to be no dispute and he can turn those boxes over to Avis.

To the extent that the trustee is asserting that the original Avis collection files (or the Software) are property of the estate, then there is a dispute.

However, in order to obtain an order from this court compelling the trustee to turn over the boxes, the movant must prevail in an adversary proceeding. An adversary proceeding must be filed to recover money or property with certain exceptions not relevant in this case. Fed.R.Bankr.P. 7001(1). An adversary proceeding is governed by Part VII of the Federal Rules of Bankruptcy Procedure. An adversary proceeding is commenced by the filing of a complaint with the court. Fed.R.Bankr.P. 7003 and Fed.R.Civ.P. 3. If the movant wants this court to resolve the dispute concerning the ownership of the Avis Files and Software, then it must file an adversary complaint.

Also, while the Bankruptcy Code contains two sections regarding turnover, those sections are not applicable. 11 U.S.C. § 542, however, can be invoked only by the trustee and its invocation requires an adversary proceeding except when the trustee demands that the debtor turn over property. Fed.R.Bankr.P. 7001(1). 11 U.S.C. § 543 can be invoked only against “custodians”. That term refers to receivers, assignees for the benefit of creditors, and trustees “appointed in a case or proceeding not under this title”. Bankruptcy trustees are not targets. Indeed, the bankruptcy trustee is the person entitled to invoke this provision of the Code.

Accordingly, the motion is denied without prejudice

16. 99-94848-A-7 BARRY R. BUFFMAN — HEARING ON MOTION TO COMPEL DISCOVERY FOR PRODUCTION OF DOCUMENTS AND SANCTIONS
00-9003 #1 — 6/27/00 [16]

**Final Ruling:** The motion is granted as noted below. On May 1, 2000, the plaintiff propounded discovery in the form of a request for production of documents. A response was due from the defendant on or before May 30, 2000. Thereafter on or about June 14, 2000, counsel for the plaintiff conferred with counsel for the defendant who stated that he could not give any assurance of when the documents would be produced. The plaintiff asks for an order compelling production of the documents and for sanctions in the amount of $1000. The defendant has not responded to this motion. Given the lack of a response, this matter is suitable for disposition without a hearing.

The motion is granted. The plaintiff shall produce, without objection, the requested documents within 10 days of the entry of an order on this matter. Sanctions are granted against the defendant only. The sanctions shall be in an amount equal to the reasonable fees incurred by plaintiff in compelling a response to the discovery. A proposed order granting the motion shall be lodged by the movant. The order shall contain a provision for the award of sanctions but the amount shall be left blank. When the order is lodged, the movant’s attorney shall file a declaration either attaching detailed billing information or containing a narrative explaining the work done and time necessary to file and prosecute this motion.

17. 00-91152-A-7 GEORGE & KRISTI WHITE — CONT. HEARING ON OBJECTION

TO THE CLOSING OF THE DEBTOR'S CASE FILED BY POLLY LATINO 5/25/00 [6]

**Tentative Ruling:** The objection is overruled. On March 27, 2000, the debtors filed a chapter 7 petition. The clerk issued a notice of commencement of the case and advised creditors that they should not file proofs of claim unless they received notice to do so. The chapter 7 trustee found no assets. Accordingly, the clerk never issued a notice to file proofs of claim.

The debtors scheduled the objecting party, Polly Latino, as a creditor. The debtor listed her address as 1604 Doris Court, Modesto, California 95354. Her address is actually 3204 Doris Court, Modesto, California 95354. The debtors were, or should have been, aware of this fact. On this basis, Ms. Latino now objects to the notice of no distribution and the closing of the case.

The failure to schedule a creditor, or list the creditor at an incorrect address, is no basis for an objection to a no-asset report. A creditor may object to the report, for instance, if the debtor has not disclosed all of his assets. In this case there is no such or similar allegation.

This is a no-asset, no-bar-date case. In such cases, creditors holding otherwise dischargeable claims against the debtor have their claims discharged even though their claims were not scheduled and even though the omitted creditors had no notice of the case. 11 U.S.C. § 727(b); Beezley v. California Land Title Co. (In re Beezley), 994 F.2d 1433 (9th Cir. 1993).

If the objecting creditor is objecting to the dischargeability of her claim, she is free to contest this within the parameters of 11 U.S.C. § 523(a)(3)(B). If the creditor has a claim that was nondischargeable pursuant to 11 U.S.C. § 523(a)(2), (4), or (6), and she did not have notice or knowledge of the bankruptcy case in time to file a complaint within the time frame required by Fed.R.Bankr.P. 4007(c), she may proceed via section 523(a)(3)(B). Section 523(a)(3)(B) provides what may be characterized as an exception to section 523(c)(1) and to the time limits prescribed by rule 4007(c). Section 523(a)(3)(B) provides that a debt of the kind specified in paragraphs (2), (4) or (6) of section 523 is not discharged if it is neither scheduled nor listed under Section 521(a) in time to permit the timely filing of a proof of claim and timely request for a determination of dischargeability of that debt, unless the creditor had actual knowledge of the case in time to file the complaint. See Fidelity National Title Insurance Company v. Franklin (In re Franklin), 179 B.R. 913 (Bankr. E.D. Cal. 1995). This complaint can be filed in this court or any court of general jurisdiction.

The objection is overruled.

18. 99-90655-A-11 NEW HIGHWAY CARRIERS, INC.
MDG #15

HEARING ON MOTION FOR AUTHORIZATION TO SELL PROPERTY OF THE ESTATE 7/14/00 [323]

**Tentative Ruling:** The motion to sell property of the post-confirmation estate on the terms provided for in the Declaration of Lawrence Green, Sr., as attached to the motion is granted on the condition stated below. The post-

confirmation debtor seeks authority to sell to Volvo Tractors for a total of $15,000.00, and Four International Tractors for a total of $8,000.00. The Tractors are encumbered by a lien held by Commercial Associates. On condition that the sale proceeds are sufficient to pay Associates in full or, if the sale proceeds are not sufficient to pay Associates in full, the sales will not close absent the written consent of Associates. Any residual will be paid into the Distribution Fund as required by the plan.

19. 98-93559-A-7 CARA LYNN HOFFMAN
00-9006 #2
BRUCE TUNSETH VS.

HEARING ON MOTION FOR CONTINUANCE OF TRIAL, CHANGE OF DISCOVERY AND OTHER DATES, AND TO BE RELIEVED AS COUNSEL
6/27/00 [17]

**Tentative Ruling:** The motion to continue the trial date and other dates is denied. On January 13, 2000, the plaintiff filed this complaint under 11 U.S.C. § 523(a)(15). On February 22, 2000, the defendant answered. On March 31, 2000, the court held a status conference and set the matter for trial on August 17, 2000. Discovery was to be completed by July 14, 2000.

On April 17, 2000, counsel for the defendant asked to withdraw from the case because the defendant could not afford to pay him. On May 8, 2000, the court granted the motion.

On June 27, 2000, counsel for the plaintiff filed a motion to continue the trial, to extend the discovery deadline and other dates and to withdraw as counsel for the plaintiff because he and the plaintiff have not been able to come to an agreement regarding fees.

The rules concerning withdrawal have been liberally construed to protect clients. 1 Witkin, California Procedure, § 100, “Attorney,” (1996) (citing Vann v. Shilleh, 54 Cal. App.3d 192, 197 (1975). The attorney has no right to withdraw until steps have been taken to avoid prejudice to the client’s rights. Id. Counsel has not taken the appropriate steps to preserve the defendant’s rights. He has known that there was a problem since “the early part of this year”, which would have been right after the complaint was filed. And yet he (evidently) conducted no discovery, made no preparation for trial, and waited until the last moment to request permission to withdraw. It appears that he continued representing the plaintiff in the hopes that the plaintiff would be able to pay him, but made no preparation for trial. It is now too late to withdraw. Counsel cannot wait on the eve of trial to withdraw. Having set aside the trial time, the time will be wasted if the trial is continued. Had the motion been more prompt (as counsel for the defendant was), the court would have granted because the plaintiff would have had the opportunity to find other counsel without disturbing the trial date. The trial will go forward as scheduled.

20. 00-90798-A-7 JAMES & SHARON JACOBS
BAE #2

HEARING ON MOTION OF TRUSTEE FOR ORDER APPROVING SALE OF LAND AND COMPROMISE OF CONTROVERSY
6/29/00 [40]

**Tentative Ruling:** The motion to sell property is granted. The debtors own a

one-half interest in two acres of unimproved real property adjacent to their residence in Twain Harte. The land value is reduced by zoning requirements and the fact that it can only be used in conjunction with adjoining parcels. The debtors will pay the estate $5,000 for the estate's interest in the property.

The trustee also requests that the court approve a compromise. During the one year prior to the filing of the petition, the debtors transferred a travel trailer with a fair market value of $9,000 to their daughter for no consideration. Their daughter has agreed to pay the estate $6,000 for the estate's interest in the trailer.

The compromise will be approved. Approval of a compromise must be based upon considerations of fairness and equity. The court may approve a compromise or settlement. Fed. R. Bankr. P. 9019. The court must consider and balance four factors: (1) the probability of success in the litigation; (2) the difficulties, if any, to be encountered in the matter of collection; (3) the complexity of the litigation involved; and (4) the paramount interest of the creditors with a proper deference to their reasonable views. In re Woodson, 839 F.2d 610 (9th Cir. 1988).

While the probability of success is apparently high, the cost of litigation would more than consume the difference between the potential recovery and the compromise amount. Further, if the trailer were returned, the trustee will likely incur costs to dispose of it. Collection is not an issue. The compromise is in the best interest of creditors, none of whom have opposed the motion.